No. 80-827

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT SCANLON, Secretary of Education of the Commonwealth of Pennsylvania,
Petitioner

v.

PATRICIA SUE BATTLE, ET AL.,
NATALIE BERNARD, ET AL.,
and
PATRICIA and JOHN ARMSTRONG, ET AL.,
Respondents

BRIEF OF RESPONDENTS BATTLE and BERNARD, *et al.* IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Is the holding of the Court of Appeals that the inflexible rule of the Pennsylvania Department of Education violates the Education for All Handicapped Children Act because it limits the special education of every handicapped child to 180 days per year, regardless of the individual needs of a child, of sufficient importance and public interest to merit review by the Supreme Court of the United States?

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BRIEF OF RESPONDENTS BATTLE and BERNARD, *et al.* IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

I. STATEMENT OF THE CASE

Plaintiffs Battle and Bernard are severely handicapped youngsters and their parents who commenced these class actions in January, 1978 alleging that, because of the nature and severity of their handicapping conditions and their unique needs, they required special education and related services in excess of 180 days per year. Approximately one week thereafter *Armstrong v.*

Kline was filed on behalf of three more severely and profoundly handicapped youngsters and their parents.

These class actions were brought against the Commonwealth of Pennsylvania, the Secretary of Education, and the officials of the local school districts and the approved private schools involved. The claims were based on the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, the Education for All Handicapped Children Act, 20 U.S.C. §§1401 *et seq.* (hereinafter referred to as the "Act") and state law.

Plaintiffs sought, *inter alia*, injunctive and declaratory relief so that they could be provided with a program of "free appropriate education" and "related services" exceeding more than 180 days per year.[1] They, also, sought a preliminary injunction to prevent the disenrollments of Patricia Sue Battle from the Woods Schools and of Natalie Woods from Elwyn Institute. These schools are "approved private schools" under Pennsylvania law which are approved by the Pennsylvania Department of Education (hereinafter referred to as the "DOE") to be reimbursed for the tuition and maintenance costs of special education programs for handicapped children. After a preliminary hearing held in February, 1978, the district court enjoined the schools from disenrolling or making any changes in the educational programming of Patricia and Natalie.

Trial was held in March, 1979 for seven (7) days. On June 21, 1979, the District Court issued its Opinion and Order. The court found the named plaintiffs to be

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1. Neither named plaintiff sought 365 days per year of uninterrupted programming. Both were attending approved private schools on a 7-day per week, residential basis, but, of course, went home for short periods of time throughout the year. The eventual class definition proposed to the district court by the plaintiffs and accepted by the court contained the phrase "in excess of 180 days of education per year."

severely handicapped children who required continuity and structure in their educational programs. *Armstrong v. Kline*, 476 F. Supp. 583 (E.D.Pa. 1979) [1a-54a]. It, also, found that these severely handicapped children, based upon the undisputed evidence, would be seriously harmed in their academic and behavioral development by frequent or long interruptions in their special education programs. *Id.* at 598, 599 [34a-38a].[2] Therefore, the court held that by limiting the special education of handicapped children to 180 days per year (hereinafter referred to as the "180 day rule"), the defendants precluded plaintiffs from receiving a "free appropriate education" in violation of the Education for All Handicapped Children Act. *Id.* at 600, 605 [38a-50a]. Defendants were enjoined from refusing to provide or fund a program of special education and related services in excess of 180 days per year to any member of the plaintiff class.

Defendants filed appeals from the district court's orders to the United States Court of Appeals for the Third Circuit. The circuit court issued its decision on July 15, 1980. The panel unanimously upheld the district court's holding that the "180-day rule" was inflexible and violated the Act. It found, as did the district court, that the Act focused upon the individual needs of each handicapped child.

All three panel members of the circuit court agreed as follows:

> . . . We believe the inflexibility of the defendants' policy of refusing to provide more than 180 days of education to be incompatible with the Act's emphasis on the individual. Rather than ascertaining the reasonable educational needs of each child in light of reasonable educational goals, and establishing a reasonable program to attain those goals, the 180 day rule imposes with rigid certainty a program re-

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2. References to Petitioner's Appendix appear in brackets.

> striction which may be wholly inappropriate to the child's educational objectives. This the Act will not permit. [108a]

Because some of its reasoning differed from that of the district court, the circuit court remanded the case indicating that some modifications of the district court's orders might be necessary. [110a] The circuit court stated that modifications, if any, because of the multiplicity of the factors involved, were best undertaken by the district court and only upon motion of the parties. In the interim, all of the orders were to be held intact.[3] Defendant Scanlon petitioned the circuit court for a rehearing *En Banc*. The petition was denied on August 22, 1980.

Petitioner seeks now to have this Honorable Court review the circuit court's sole holding regarding the 180-day rule by petitioning for the granting of a Writ of Certiorari.

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3. Defendant moved the district court to vacate all of its orders. That motion was denied. The defendant then filed an appeal of the denial to the circuit court. The subject of the motion and appeal are not properly before this Honorable Court.

II. SUMMARY OF THE ARGUMENT

The circuit court interpreted the Act strictly and narrowly on the express wording of the Act. The Petitioner is requesting review of the circuit court's holding that Pennsylvania's "180 day rule" cannot coexist with the Act's explicit emphasis on the individual educational needs of handicapped children.

There is no doubt that the Act represents Congressional use of the Spending Power to further a broad policy of assuring that handicapped children will receive a free education appropriate to their unique needs and that recipients must comply with detailed provisions as a prerequisite for receiving funds. The Act entitles all handicapped children in a recipient's jurisdiction to a "free appropriate education" and to certain procedural safeguards.

The circuit court recognized the Act's deference to local autonomy and control and therefore did not rule on the substantive content of educational programs. Rather, it held that the "180 day rule" did not conform to the procedural requirements of the Act's specific provisions for individualizing each handicapped child's education.

Respondents do not believe that the Petitioner's arguments vis-a-vis resource allocations and financial considerations are persuasive. Moreover, they contend that the circuit court's striking down of the inflexible "180 day rule" enhances local participation in and control over determining the content and yearly duration of each handicapped child's special education program.

Further, respondents argue that this case does not present an issue of importance or public interest sufficient to warrant the granting of a Writ of Certiorari and that the petition should be denied.

II. ARGUMENT

A. This Case Does Not Present a Question of Importance or Public Interest Sufficient for the Granting of the Writ.

The Act is more than a funding statute. It represents Congress' use of the Spending Power to "further broad policy objectives by conditioning receipt of federal monies upon compliance by the recipient with federal statutory and administrative directives" *Fullilove v. Klutznick*, — U. S. — , 100 S.Ct. 2758, 2772 (1980). *Lau v. Nichols*, 414 U. S. 563 (1974).

In strict constructionist fashion, the circuit court looked at the express wording of the Act. It pointed to the Act's explicit focus on the individual needs of handicapped children. For example, the court stated:

> At the core of the Act is a detailed procedure for determining the contours of the free appropriate public education to be delivered to each child. . . . [citations omitted]. We believe that these procedural safeguards require individual attention to the needs of each handicapped child. . . . The strongest statement of this requirement is the statutory mandate of individualized educational programs. The IEP is the statutory vehicle for formulating the educational objectives and the education program for each child. We consider it most persuasive that at the fundamental point in the educational decision making process, the statute requires consideration of each individual child. Nor do the later procedures required by the Act depart from this emphasis. The appeal prescribed by the Act is an appeal from the decisions reflected in IEP. *See* 20 U.S.C. §1415(b) (1976). Moreover, as difficult as it is to define the scope of the "unique needs" which must be met by special education, *see id.* §1401 (16), there can be little doubt that by requiring attention to "unique

needs", *the Act demands that special education be tailored to the individual* (emphasis added) [107a] *Sub. nom. Battle v. Commonwealth*, Nos. 79-2158, 79-2188-90, 79-2568-70 (3d Cir. July 15, 1980) [80a-124a].

Petitioner argues that the circuit court's holding that the inflexible 180-day rule is contrary to the Act will result in "greatly" increased costs in the education of handicapped children. It is this alleged increase in costs which the Petitioner believes is of "great public importance." Significantly, the petitioner did not present evidence at trial, or at any other point below, as to an estimated number of children affected by the court's rulings or the costs for providing programs to those children eligible to receive more than 180 days of education per year.[4] However, financial considerations may not be used as a shield against the legal rights of the plaintiffs. *Bradley v. Milliken*, 540 F.2d 229, 244 (6th Cir. 1976).

Indeed, the Act recognizes that state and local agencies will have to expend money in order to be in compliance. It provides financial assistance to recipients who comply with the obligations and responsibilities embodied in its statutory provisions, in an effort to assure that handicapped children will be provided with a "free appropriate education."

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4. The Pennsylvania School Boards Association, in its *Amicus* Brief at 3-4, refers to testimony of Petitioner Scanlon on October 3, 1979, several months *after* the district court's decision in this matter. The testimony purported $200 million to $500 million annually as projected costs to implement the court's orders. There was no real basis for such cost projection as can be seen in the data submitted to the district court in June, 1980 by the petitioner as required by Remedial Order #2. The data identified approximately 2,100 handicapped school-aged persons as being eligible for or needing more than 180 days of education per year, or less than 1% of all school-aged handicapped persons receiving special education at that time. Moreover, of the 2,100, only 15 children were in residential approved private schools; the others were attending public school facilities.

In *Mills v. Board of Education*, 348 F. Supp. 866, 875-876 (D.D.C., 1972) the defendants raised the spectre of costs just as Petitioner does here. The *Mills* court was not persuaded by the arguments regarding financial resources and allocations. It stated that:

> . . . the District of Columbia's interest in educating children clearly must outweigh its interest in preserving its financial resources. *Id.* at 876.

The Petitioner's argument that the circuit court's decision interferes with the ability of state and local authorities to make educational policy and allocate limited educational resources is unsupported by fact. The striking down of the arbitrary "180 day rule" in no way interferes with Petitioner's ability to develop educational standards and goals. Indeed, the circuit court's holding prohibits an inflexible cut-off which, if left standing, would interrupt the continuity and structure of the individual programs developed by the local and state school authorities to meet the unique needs of certain handicapped children. This will assist the Petitioner in achieving its stated policy and goal of providing each handicapped child with a free appropriate education.

As for allocation of resources, according to the Petitioner, a federal court's decision may not affect the outlay of state or local monies. Its petition stands for the proposition that if a federal court's holding impacts in any way upon the allocation of monies and resources, this rises to the level of public import sufficient for the granting of the Writ. Respondents do not believe that federal courts can be so restricted and hampered.

This Honorable Court has recognized the wide latitude that federal courts have in constructing remedies to correct constitutional violations. *Griffin County v. County Board of Prince Edward County*, 377 U.S. 218 (1964).

Petitioner offers no persuasive reason as to allocation of resources which are of sufficient importance or public interest to support the granting of the Writ.

B. The Court Below Correctly Struck Down an Inflexible Rule That Is Contrary to the Education For All Handicapped Children Act.

After analyzing the Act the circuit court found:

> Having concluded that the states are responsible in the first instance for setting reasonable educational objectives and reasonable means to achieve these objectives, it falls upon us to determine if the Act restricts the states in these determinations. We believe that it does. First, the Act provides for pervasive federal oversight by the Commissioner of Education. Second, the Act sets forth explicitly detailed procedures to assure that the states will properly exercise their responsibility to provide "free appropriate public education." [106a]
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> * * *
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> To be sure, the Act contemplates that reasonable educational standards may be set by the states. *See* 20 U.S.C. §1401(18)(B) (1976) (definition of "free appropriate public education"): *Id.* §1412(2)(b) (development of state plan detailing policies and procedures). We believe, however, that these standards must allow for the individual consideration of each handicapped child. [108a]

The circuit court recognized that the Act conditioned receipt of federal monies upon compliance by the recipient (Petitioner) of its statutory provisions. *Fullilove v. Kutznick*, supra. Because the Act expressly focused on the individual needs of the handicapped child, the circuit court found Petitioner's administrative policy of limiting the length of the school year to 180 days for all handicapped children, regardless of their individual instructional needs, to be inflexible and contrary to the Act.

Petitioner would have the Court ignore the express language and intent of the Act. Rather, the Petitioner

reasons, that any state "standard" must be permitted in deference to "local control" and despite the Act's language and intent. The "180 day rule" is an administrative policy. However, even if it was a "standard", the Act's deference to local control and the establishment of standards by state educational agencies, do not confer a right to the recipient to promulgate standards that violate the Act.

The circuit court pointed to those specific provisions of the Act which refer to individualization of special education programs. For example, a "free appropriate education" is defined as special education and related services which "are provided in conformity with the individualized program." 20 U.S.C. §1401(18) [141a]. Special education is defined as free, specially designed instruction "to meet the unique needs of a handicapped child." 20 U.S.C. §1401(16) [140a-141a]. Perhaps the most compelling emphasis on individual needs is the Act's requirement of an "individual education program" for every handicapped child, which is defined as:

> . . . a written statement for each handicapped child . . . which statement shall include (A) a statement of the present levels of educational performance of each child, (B) a statement of *annual goals*, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the *projected date for initiation and anticipated duration of such services*, and (E) appropriate objective criteria and evaluation procedures and schedules for determining on at least an annual basis, whether instructional objectives are being achieved (emphasis added) 20 U.S.C. §1401(19) [141a-142a].

The circuit court correctly interpreted the Act. There is no justification for the granting of the Writ merely on Petitioner's erroneous reading of the Act.

C. There Are No Special or Important Reasons for the Granting of the Writ of Certiorari.

Petitioner offers no special and important reasons in his petition. For example, there is no conflict of decisions on this matter between or among the courts of appeals; no important state or territorial question has been decided; there is no important question of federal law involved herein which has not been, but should be, settled by this Court; nor has a federal question been decided in a way in conflict with applicable decisions of this Court. U.S. Sup. Ct. Rule 17.1.

The petition is based upon the Petitioner's dissatisfaction with the circuit court's decision. That dissatisfaction is based on the possibility of increased costs to Petitioner.

In *Goldberg v. Kelly*, 397 U.S. 254 (1969), this Honorable Court held that constitutional rights must be afforded despite greater expense involved in affording those rights to recipients of a statute. The same reasoning applies to statutory entitlements.

The Petitioner also argues that the circuit court's holding infringed upon local control of allocating resources and educational policy. However, this case does not involve the reordering of a state's scheme for financing education as in *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1 (1973), nor, has the court below rendered a decision which limits or infringes upon local autonomy or the opportunity for citizens to participate in decision-making and the structuring of school programs to fit local needs. *Milliken v. Bradley*, 418 U.S. 172 (1974). Indeed, the circuit court's recognization that an individualized education program is at the core of the Act's deference to local autonomy is in direct contradiction to the Petitioner's contentions. The prohibition of the Petitioner's inflexible "180 day rule", permits greater participation by the parent and the school authorities in fashioning a program of special

education and related services to the unique needs of each handicapped child.

In the instant matter, the circuit court did not order affirmative action not required by the Act or impose on the states an obligation to lower or effect modifications to their standards. *Southeastern Community College v. Davis*, 422 U.S. 397 (1979).

Although the Petitioner argues that a result of the circuit court's holding will be to limit funding to non-handicapped children to a greater degree than to handicapped children, there is no factual basis for his assumption.[5] Significantly, Petitioner neglects to mention the fact that regardless of the circuit court's decision, the education of handicapped children costs more than that of non-handicapped children. Indeed, the Act represents congressional recognition that states need assistance in educating handicapped children. It is, also important to note that any increased costs will trigger an increase in payments to the state under the "excess costs" provision of the Act, as defined in 20 U.S.C. §1401 (20) [142a].[6]

Finally, the Petitioner has not made a case for the granting of the Writ based upon its argument that the circuit court's decision is "novel." What is novel is the fact that this is the first circuit court interpretation of the Act. Standing alone, this is not a basis for the granting of the Writ. Until or unless there is a conflict among the circuits, there is no special or important reason for the granting of the Writ.

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5. The Petitioner also contends that the Act is "merely" an equal educational opportunity statute for handicapped children. As the district court stated:

> Defendants cannot defend their 180 day rule by asserting that it is applied equally to handicapped as well as non-handicapped children. Equality of services and programs is not the test for determining whether an appropriate education is being provided by the state . . . *Armstrong* at 605. [49a-50a].

6. Petitioner has not expended state funds to comply with Remedial Order #2, but has used funds received under the Act.

The circuit court avoided an interpretation of the "substantive content of educational programs under the Act." [109a-110a]. Rather, it based its decision on the procedural requirements of the Act and upon the express language of the Act. The Writ should, therefore, be denied.

IV. CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Date: December 18, 1980.